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Supreme Court, U.S.
FILED

No. 98-811139 NOV 3 1998

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

EZELL GILBERT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED FOR REVIEW

Is the offense of carrying a concealed firearm a "crime of violence" for purposes of imposing an enhanced sentence under the career offender provisions of the United States Sentencing Commission, *Guidelines Manual*, §§ 4B1.1 and 4B1.2(1)(Nov. 1, 1995)?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Ezell Gilbert

United States of America

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions and Orders Below	1
Statement of the Basis for Jurisdiction	1
Pertinent Provisions of the United States Sentencing Commission, *Guidelines Manual* (Nov. 1, 1995)	2
Statement of the Case	4
Reason for Granting the Writ	7

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS AND BECAUSE THE CRIME OF CARRYING A CONCEALED FIREARM IS NOT A "CRIME OF VIOLENCE" AS DEFINED BY THE UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL*

Conclusion 11

Appendix A - April 15, 1998 Opinion on the Merits, *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998) 1a

Appendix B - August 5, 1998 Order Denying Petition for Rehearing 14a

TABLE OF AUTHORITIES

Cases **Pages**

Stinson v. United States,
508 U.S. 36, 113 S.Ct. 1913,
123 L.Ed. 2d 598(1993) 8

United States v. Frazier - El,
10 F.Supp. 2d 508 (D. Maryland 1998) 7

United States v. Gilbert,
138 F. 3d 1371 (11th Cir. 1998). 1,4-6

United States v. Hall,
77 F.3d 398 (11th Cir. 1996) 6

United States v. Johnson,
704 F.Supp. 1403 (E.D. Mich. 1989),
aff'd, 900 F.2d 260 (6th Cir. 1990) (table) 8

United States v. Whitfield,
907 F. 2d 798 (8th Cir. 1990). 7,8

United States Sentencing Commission, *Guidelines Manual*

U.S.S.G. § 4B1.1 (Nov. 1, 1995) . . . . . i, 2, 4,6

U.S.S.G. § 4B1.2(1) (Nov. 1, 1995) . . . . . i, 2-5, 8-10

U.S.S.G. § 4B1.2(a) (Nov. 1, 1997) 4,5

Statutes

18 U.S.C. § 924(e) 6

18 U.S.C. § 3231. 4

21 U.S.C. § 841(a)(1). 4

28 U.S.C. § 1254(1) 1

Petitioner, Ezell Gilbert, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals in *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998), is reproduced in its entirety in Appendix A, *infra*.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on April 15, 1998. Petitioner's motion for rehearing was denied on August 5, 1998; therefore, this petition is timely filed under Sup.Ct.R. 13.3. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit by Writ of Certiorari is invoked under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS OF THE UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL (Nov. 1, 1995)*

U.S.S.G. § 4B1.1 provides in pertinent part that,

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1 (Nov. 1, 1995). The definition of "crime of violence" is found in U.S.S.G. § 4B1.2(1), which provides in its entirety that,

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term, exceeding one year, that–
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> > (ii) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a

> serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(1)(Nov. 1, 1995). The Sentencing Guidelines commentary accompanying U.S.S.G. § 4B1.2(1), finally, provides that,

> "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extensions of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.
>
> "Crime of violence" does not include the offense of unlawful possession of a firearm by a felon.

U.S.S.G. § 4B1.2, comment., (n.1)(Nov. 1, 1995).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 18 U.S.C. § 3231.

On January 18, 1996, the United States District Court for the Middle District of Florida arraigned Mr. Gilbert on a two count indictment alleging possession of both marijuana and cocaine base with the intent to distribute, both in violation of 21 U.S.C. § 841(a)(1). On March 4, 1996, Mr. Gilbert entered pleas of guilty to both counts.

According to Mr. Gilbert's subsequent presentence report, the probation office recommended imposition of an enhanced penalty under the career offender provisions of the United States Sentencing Commission, *Guidelines Manual*, §§ 4B1.1 and 4B1.2(1).[1] Mr. Gilbert filed a timely objection to this portion of his presentence report, but the district court overruled the objection and sentenced him as a career offender. Mr. Gilbert appealed.

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[1]This specific subparagraph is currently cited as § 4B1.2(a). *See* United States Sentencing Commission, *Guidelines Manual* (Nov. 1, 1997).

The Eleventh Circuit Court of Appeals affirmed. *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998). The *Gilbert* court observed that the career offender enhancement requires at least two prior convictions of either a "crime of violence" or a drug felony, and that Mr. Gilbert conceded he has one drug felony conviction. *Id.* The court reasoned that Mr. Gilbert contends that the second conviction on which the district court relied, the offense of carrying a concealed firearm in violation of Florida law, is not a "crime of violence" as defined by the United States Sentencing Commission, *Guidelines Manual*, § 4B1.2(1). *Id.*

Like the district court, the Eleventh Circuit rejected Mr. Gilbert's contention. *Id.* The *Gilbert* court noted that a felony constitutes a crime of violence in either of two ways: when it has an element of force or attempted force; or when it is "'burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*'" *Id.*, *quoting* U.S.S.G. § 4B1.2(1)(ii)(Nov. 1, 1995)[2] (emphasis added). Observing that the elements of a concealed firearm offense under Florida law do not include any use of force, the *Gilbert* court reasoned that

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[2]This provision is now enumerated as U.S.S.G. § 4B1.2(a)(2)(Nov. 1, 1997).

"carrying a concealed firearm, therefore, is a 'crime of violence' only if it 'presents a serious potential risk of physical injury.'" *Id.*

The *Gilbert* court then looked to a case, *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996), it had previously decided under the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The ACCA employs a term, "violent felony," that is defined, like the term "crime of violence" in U.S.S.G. §§ 4B1.1 and 4B1.2(1), to include conduct posing a serious potential risk of injury. *Id.* The *Gilbert* court noted that, in *Hall*, the Eleventh Circuit previously found that the offense of carrying a concealed weapon under Florida law constitutes a "violent felony" under the ACCA. *Id., citing Hall*, 77 F.3d at 401. Accordingly, the *Gilbert* court held, the offense of carrying a concealed firearm is a "crime of violence" as defined by U.S.S.G. § 4B1.2(1)(ii)(Nov.1, 1995).

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS AND BECAUSE THE CRIME OF CARRYING A CONCEALED FIREARM IS NOT A "CRIME OF VIOLENCE" AS DEFINED BY THE UNITED STATES SENTENCING COMMISSION, *GUIDELINES MANUAL*.

A writ of *certiorari* is warranted in this case under Sup.Ct.R. 10(a) because the decision by the Eleventh Circuit conflicts with the decision, holding to the contrary on the same issue, of the Eighth Circuit in *United States v. Whitfield*, 907 F.2d 798 (8th Cir. 1990).[3]

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[3] In *United States v. Frazier -El*, 10 F.Supp. 2d 508 (D.Maryland 1998), the district court, citing *Whitfield* and *Hall*, *Gilbert's* predecessor, expressly observed that the Eleventh and Eighth Circuit are the only two circuits that have addressed the issue of whether "carrying a dangerous weapon," the Maryland offense, is a "violent felony" under the ACCA, and that these circuits are in conflict. *Id.* at 510-511. Also, a district court within the Sixth Circuit

The *Whitfield* court concluded that a conviction of carrying a concealed weapon under Missouri law was not a "violent felony" under the ACCA. 907 F.2d at 800. Citing *Johnson, supra*, the Eighth Circuit held that, "Although carrying an illegal weapon may involve continuing risk to others, the harm is not so immediate as to 'present[ ] a serious potential risk of physical injury to another.'" *Id.*

In addition to Sup.Ct.R. 10(a), *certiorari* should be granted on the basis of Sup.Ct.R. 10(c), as the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Given the fact that the relevant Sentencing Guidelines commentary expressly excludes the offense of unlawful possession of a firearm by a felon from the definition of a "crime of violence," *see* U.S.S.G. § 4B1.2, comment., (n.1), the virtually identical offense of carrying a concealed firearm should be excluded as well. In *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993), this Court held that this specific

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anticipated the position eventually taken by the Eighth Circuit in *Whitfield*, holding that the offense of carrying a concealed weapon under Michigan law is not a "violent felony" under the ACCA. *United States v. Johnson*, 704 F.Supp. 1403, 1407 (E.D. Mich. 1989), *aff'd*, 900 F.2d 260 (6th Cir. 1990)(table).

commentary "is a binding interpretation of the phrase 'crime of violence.'" 508 U.S. at 47, 113 S.Ct. at 1920.

Unlike a number of offenses, the crime of carrying a concealed firearm is not expressly listed in either the applicable guideline definition, U.S.S.G. § 4B1.2(1), or the accompanying commentary. Additionally, as the *Gilbert* court conceded, this offense is not encompassed by U.S.S.G. § 4B1.2(1)(i), as it does not have "as an element the use, attempted use, or threatened use of physical force against the person of another..." Accordingly, if the crime of carrying a concealed weapon may be treated as a "crime of violence" under U.S.S.G. § 4B1.2(1), the crime must satisfy § 4B1.2(1)(ii), which embraces "burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In addition to expressly excluding the offense of felon-in- possession from this definition, the accompanying commentary also requires, to constitute a "crime of violence," that "the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of

physical injury to another." U.S.S.G. § 4B1.2, comment., (n.1).

The conduct charged in the crime of carrying a concealed weapon does not, by its nature, present the serious potential risk of physical injury presented by the kinds of offenses - crimes involving home burglary, arson, extortion, and explosives - the guideline provides as examples. In expressly excluding the crime of felon-in-possession, the commentary bolsters the conclusion that the unenumerated offense of carrying a concealed firearm cannot constitute a "crime of violence" under the career offender provision of the Sentencing Guidelines.

The Eleventh Circuit Court of Appeals in this case has interpreted U.S.S.G. § 4B1.2(1) in a way that conflicts with the interpretation adopted by the only other courts, including the Eighth Circuit, that have reached the issue. Moreover, the *Gilbert* court's conclusion cannot be harmonized with the relevant guideline or its binding commentary. For these reasons, a writ of *certiorari* should be granted.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari prayed for within.

Respectfully Submitted,

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Appendix A

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, 138 F.3d 1371 (11th Cir. 1998)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ezell GILBERT,
Defendant-Appellant.

No.: 97-2401

Non-Argument Calendar
United States Court of Appeals,
Eleventh Circuit.

April 15, 1998.

Before COX, BLACK and HULL, Circuit Judges.

PER CURIAM:

Appendix A

Ezell Gilbert was convicted, following a plea of guilty, of possession with intent to deliver cocaine base and possession with intent to deliver marijuana, both in violation of 21 U.S.C. §841(a)(1). He appeals his 292-month sentence, raising three issues. We affirm.

1. *Career Offender Status*

The district court sentenced Gilbert as a career offender under U.S.S.G. § 4B1.1. To qualify as a career offender, a defendant must have been convicted of at least two "crimes of violence" or drug crimes. *See id.* Gilbert clearly had one — he was previously convicted of possession of cocaine with intent to distribute. But Gilbert contends that the second crime on which the district court relied, carrying a concealed firearm in violation of Florida law, is not a "crime of violence," and

that he should therefore not be sentenced as a career offender. This court reviews a district court's interpretation of the Sentencing Guidelines de novo. *See United States v. Spell*, 44 F.3d 936, 938 (11th Cir. 1995).

Although this court has never reached the precise question whether carrying a concealed firearm is a "crime of violence" as defined by U.S.S.G. § 4B1.2(1), it has posted the road signs leading the way. There are two ways for a crime to be a "crime of violence" under §4B1.2(1): either the offense has an element of force or attempted force, or it "is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii)(1995). The elements of a concealed firearm

offense do not include any use of force; knowing carrying and concealment suffice. *See Smith v. State*, 687 So.2d 875, 878 (Fla. App. 2d Dist. 1997). Carrying a concealed firearm, therefore, is a "crime of violence" only if it "presents a serious potential risk of physical injury."

The same language concerning a "serious potential risk" appears in the federal armed career criminal statute, 18 U.S.C. §924(e), where it is an element of a "violent felony." Construing that section, this court has held that carrying a concealed weapon is conduct that poses a serious potential risk of injury. *See United States v. Hall*, 77 F.3d 398, 401(11th Cir. 1996). Because the definitions of "violent felony" and "crime of violence" are in this respect identical, *Hall's* conclusion applies equally to the question at hand here. *Cf. United States v. Patton*,

114 F.3d 174, 176 (11th Cir. 1997) (extending *Hall's* reasoning to the definition of "crime of violence" in §4B1.2(1)). We thus hold that carrying a concealed weapon in violation of Florida law is a "crime of violence" under U.S.S.G. § 4B1.2(1). Gilbert was properly sentenced as a career offender.

2. Refusal to Depart Downward

At Gilbert's sentencing hearing, the court expressed frustration at the sentence it was required to impose for Gilbert's small-scale drug dealing, enhanced by one previous instance of small-scale dealing and a concealed firearm offense:

> The fact that I think the sentence is too high is immaterial. Maybe I shouldn't say what I think, but Congress has gone too far. For us to pay for this man to be in jail for 24 years is ridiculous when it runs $30,000 a year. I can see that money going

> for other things. How do we curb him? I don't know. But I hate spending $30,000 a year for the next 24 years for him. He doesn't deserve it. I'd rather spend that money on some poor child, some poor person, sick person, some deprived person.
>
> But I don't see any authority under the law for me to downwardly depart. So, counsel, I have given you reversible error if you can convince the Eleventh Circuit that I'm wrong.

(R.3 at 4-5.) Gilbert asserts that the district court found that Gilbert's criminal history was overstated, and that the court accordingly had authority to depart downward under U.S.S.G. § 4A1.3. Although a discretionary refusal to depart downward is not appealable, we may consider de novo whether the district court had authority to depart if the refusal to depart downward was based on the district

court's perceived lack of authority. *United States v. Fossett*, 881 F.2d 976,979 (11th Cir. 1989).

Gilbert is correct that the district court could have departed downward if it had found Gilbert's criminal history to be overrepresented. *See* U.S.S.G. § 4A1.3 (policy statement)(downward departure may be appropriate for defendant with extensive history of petty crime); *United States v. Lindia*, 82 F.3d 1154, 1165 (1st Cir. 1996). But the record does not reveal such a finding. The court's statement followed Gilbert's counsel's argument that the court should depart downward because of Gilbert's overrepresented criminal history. Even so, the district court did not suggest that Gilbert's criminal history did not accurately reflect the seriousness of his conduct. Rather, the court simply conveyed its discontent

with the policy choices that Congress has made in imposing high sentences for relatively minor crimes, thus requiring spending for prisons instead of more constructive programs. Disagreement with the policy choices underlying the Sentencing Guidelines and sentencing statutes is not a ground for downward departure, and the court properly determined that it lacked authority to depart downward. *See United States v. Gonzalez-Lopez*, 911 F.2d 542, 551 (11th Cir. 1990).

3. *Extra Acceptance-of-Responsibility Point*

The district court awarded Gilbert a two-point reduction in his offense level for acceptance of responsibility. Gilbert contends, however, that he is entitled to a three-point reduction under U.S.S.G. § 3E1.1(b) either because he timely provided information

to the Government concerning his offense, U.S.S.G. § 3E1.1(b)(1), or because he timely notified the Government of his intention to plead guilty, U.S.S.G. § 3E1.1(b)(2). The timeliness of these acts is an issue of fact, the resolution of which we review for clear error only. *See United States v. McConaghy*, 23 F.3d 351, 353 (11th Cir. 1994).

Apart from a bare assertion that he spoke to the DEA, there is no record evidence to suggest that Gilbert provided any information to the Government concerning his offense, and we thus reject his challenge based on that ground. The question of the timeliness of Gilbert's guilty plea requires a little more discussion.

Gilbert was indicted on December 1, 1995. He was arraigned on January 18, 1996. On January 24, trial

was set for March 4. On February 13, he moved to suppress evidence. The court denied this motion on March 1, and on March 4 – the day of the trial – Gilbert pleaded guilty. There is no record evidence of when Gilbert notified the Government of an intent to plead guilty, but the record shows that the Government filed an exhibit list and notice of prior convictions on March 1.

As a general rule, pleas on the eve of the trial are not timely. *See United States v. Kimple*, 27 F.3d 1409, 1413 (9th Cir. 1994); *United States v. Donovan*, 996 F.2d 1343, 1345 (1st Cir. 1993). Pleas at that time do not help either the Government to avoid trial preparation or the court to manage its schedule efficiently, the two purposes served by the §3E1.1(b) additional one-point reduction. *See McConaghy*, 23 F.3d at 353.

Gilbert contends nonetheless that in his case he pleaded guilty very soon after the denial of his motion to suppress, and that the plea was therefore timely; to conclude otherwise, he contends, would penalize him for exercising a right to seek suppression of evidence. Not so. First, this court has declined to consider the Guidelines' limitations on some offense-level reductions to be improper penalties for exercise of legal rights. *See United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997). Second, looking at the timeliness of the plea *solely* from the defendant's perspective (as Gilbert suggests), without taking into account the obvious fact that the Government had to prepare for trial and therefore did not benefit from avoiding trial preparation, defeats the purpose of § 3E1.(b)'s incentive to plead early. It is after all a rare case

when the defendant does not plead as soon as he believes it convenient and appropriate for him to do so. Thus, if the defendant's trial strategy (such as a choice to file a motion to suppress) is given undue weight, a guilty plea would almost always warrant a three-point reduction regardless of whether §3E1.1(b)'s purposes have been served. To avoid this result, district courts should give more weight to state of the Government's trial preparation than to the defendant's position or strategy.[1] So considered, the district court's finding that the plea was not timely is not clearly erroneous.

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[1] Of course, in the unusual circumstances that the defendant's delay is caused *only* by his counsel's proven need to investigate the propriety of pleading guilty, *McConaghy* requires that the cause for the defendant's delay figure into the timeliness assessment. *See McConaghy*, 23 F.3d at 354. No such circumstances have been shown here.

For the foregoing reasons, Gilbert's sentence is affirmed.

AFFIRMED.

Appendix B

APPENDIX B - AUGUST 5, 1998
ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-2401

Filed - U.S. Court of Appeals
Eleventh Circuit - August 5, 1998
Thomas K. Kahn, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EZELL GILBERT,
a.k.a. Azell Gilbert,
Defendant-Appellant.

Appendix B

On Appeal from the United States District Court
for the Middle District of Florida on Petition(s)
for Rehearing and Suggestion(s) of Rehearing En Banc
(Opinion_____, 11th Cir., 19__,__F.2d___).

BEFORE: COX, BLACK, and HULL, Circuit Judges,

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE